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CHARLES ELMORE

No. 21

In the Supreme Court of the United States

October Term, 1929.

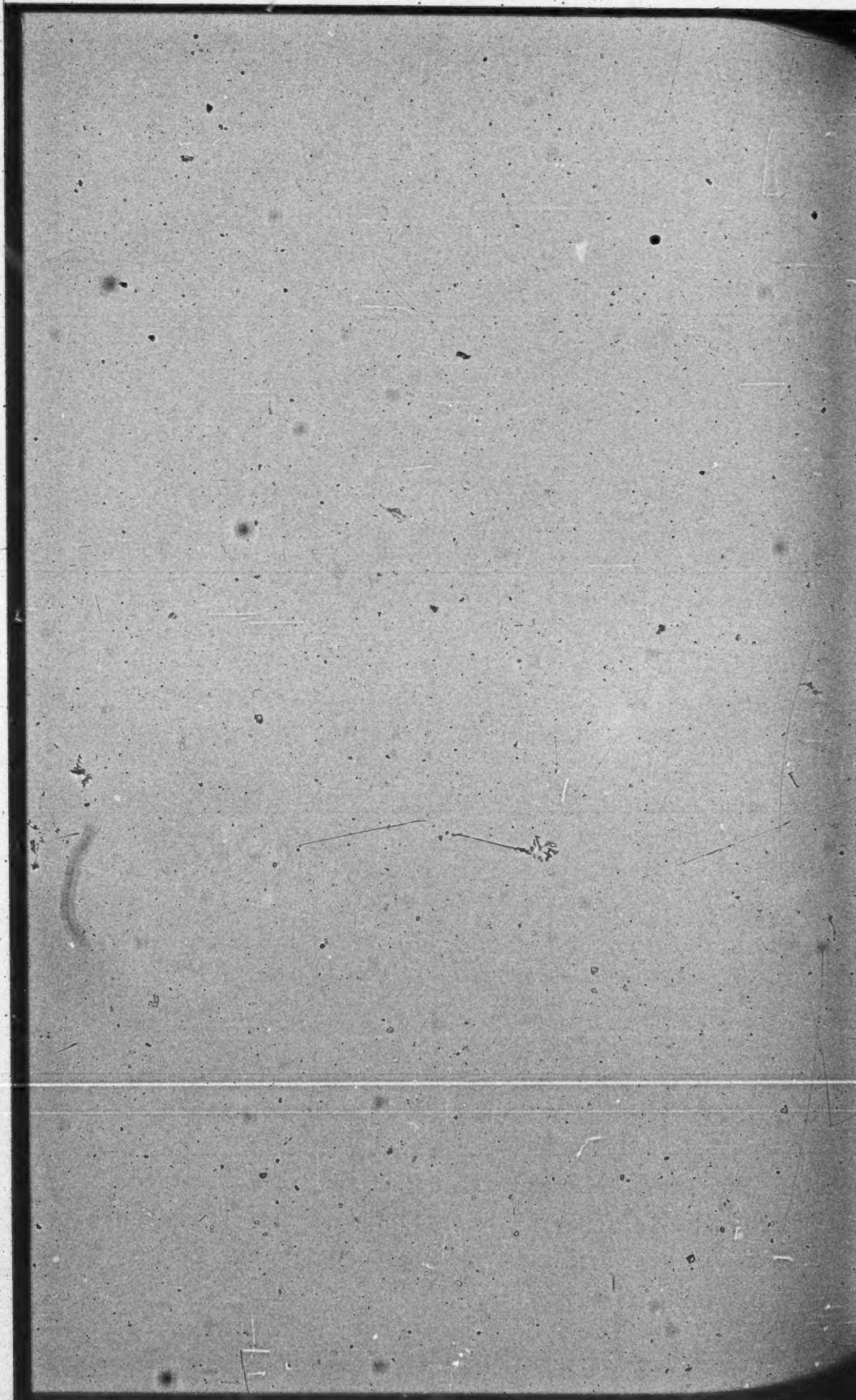
UNITED STATES OF AMERICA, *Petitioner,*

vs.

THE EQUITABLE TRUST COMPANY OF NEW YORK, *ET AL., Respondents.*

SUGGESTION OF DIMINUTION OF RECORD AND MOTION FOR *CERTIORARI* TO CORRECT SAME.

CARROLL G. WALTER,
New York, N. Y.,
RAYBURN L. FOSTER,
Tulsa, Oklahoma,
ALMOND D. COCHRAN,
Okmulgee, Oklahoma,
Counsel for all Respondents Other Than The Equitable Trust Company and Murray, Aldrich & Roberts.



IN THE SUPREME COURT OF THE UNITED STATES.
October Term, 1929.

No. 530

UNITED STATES OF AMERICA, *Petitioner,*

vs.

THE EQUITABLE TRUST COMPANY OF NEW YORK; MURRAY, ALDRICH & ROBERTS; EDWARD J. PATTERSON; J. FREDERICK EAGLE; WILLIAM GREENOUGH; SHERMAN DAY; CARROLL G. WALTER AND DODGE L. MARKS, COMPOSING THE FIRM OF PATTERSON, EAGLE, GREENOUGH & DAY; RAYBURN L. FOSTER AND R. B. F. HUMMER, COMPOSING THE FIRM OF HUMMER & FOSTER; ALMOND D. COCHRAN, SURVIVING PARTNER OF THE FIRM OF COCHRAN & ELLISON; C. B. McCRORY AND DUDLEY C. MONK, COPARTNERS COMPOSING THE FIRM OF McCRORY & MONK; AND ELMER S. BAILEY, INDIVIDUALLY AND AS *PROCHEIN AMI* OF JACKSON BARNETT,

Respondents.

SUGGESTION OF DIMINUTION OF RECORD AND MOTION FOR *CERTIORARI* TO CORRECT SAME.

Now come the undersigned respondents and respectfully suggest that there is a diminution of the record filed in the above entitled cause, and, pursuant to Rule 17, they

respectfully move that this honorable court issue its writ of *certiorari* directed to the Circuit Court of Appeals for the Second Circuit commanding that court to certify and send to this court certain papers which are of record in that court in this cause.

The papers omitted are of two distinct classes: *(a)* The depositions, testimony, exhibits and briefs which were submitted to and filed in the District Court but not actually printed for use in the Circuit Court of Appeals (R. 359-367); and *(b)* certain of the proceedings had in the Circuit Court of Appeals itself.

The omission of the papers of the first-mentioned class is deemed by these respondents to be a fatal objection to the granting of petitioner's application for a review of the decision of the Circuit Court of Appeals and is relied upon by them as such (see their brief in opposition to petitioner's application for writ of *certiorari*).

The papers of the second-mentioned class are material upon the question of the timeliness of petitioner's application, and their certification here is now requested for that reason. Those papers are:

1. The judges' indorsement upon the original petition for rehearing filed by these respondents in said cause showing the denial of said petition on September 7, 1929, and the indorsement showing the filing thereof in the office of the clerk of the Circuit Court of Appeals on September 11, 1929.

2. The entry made upon the docket of the Circuit Court of Appeals on September 11, 1929, reading "Petition for rehearing denied."

3. The entry upon the docket of the Circuit Court of Appeals, or other record, showing that the mandate of said court was issued to the District Court for the Southern District of New York on September 11, 1929.

The reasons for the presentation of this motion are as follows:

Petitioner's petition for a writ of *certiorari* to review the decision of the Circuit Court of Appeals was not filed in this court until December 18, 1929. The record accompanying said petition makes it appear that respondents' petition for rehearing was denied by the Circuit Court of Appeals on September 18, 1929 (R. 384). The petition for rehearing in fact bears an indorsement "Petition denied, T. W. S., A. N. H., September 7, 1929" (those being the initials of two of the judges of the Circuit Court of Appeals who sat in the case), and under that indorsement there is a stamp affixed by the clerk of the Circuit Court of Appeals which reads, "United States Circuit Court of Appeals, Filed September 11, 1929." There is also an entry upon the docket of the Circuit Court of Appeals made on September 11, 1929, reading "Petition for rehearing denied." The mandate of the Circuit Court of Appeals was thereupon issued to the District Court of the United States for the Southern District of New York on September 11, 1929, and said mandate was actually received and filed in said District Court on September 11, 1929. The clerk of the Circuit Court of Appeals notified counsel for respondents that the petition for rehearing had been denied on September 11, 1929, and the clerk of the District Court also notified counsel for re-

spondents that the mandate had been received and filed by him on September 11, 1929. Counsel for petitioner, *viz.*, the United States Attorney for the Southern District of New York, likewise had such notice and actually conferred with counsel for respondents with respect to the form of the decree to be entered by the District Court upon the mandate prior to September 18, 1929.

Respondents, therefore, desire to oppose petitioner's petition for *certiorari* upon the ground, among others, that such petition was not filed within the three months provided by the statute (Act February 13, 1925, 43 Stat. 936; U. S. Code, Title 28, Sec. 350) and they desire the record to show the facts above set out in support of that ground of opposition.

Notice of the filing of petitioner's petition for *certiorari* was served upon respondents on December 21, 1929, during the absence of their counsel, and as the time fixed by the rules for the submission of said petition to the court is thus January 13, 1930, there is not sufficient time, since the defect in the record was discovered, to procure a certified transcript of the papers requested for annexation to this motion and print and serve this motion in time for it to be submitted by that date.

Wherefore, the undersigned respondents pray that a *certiorari* to correct diminution of record be issued out of and under the seal of this honorable court directed to the Circuit Court of Appeals for the Second Circuit commanding that court to certify and send to this court the record of

its proceedings in this case hereinabove specifically enumerated.

CARROLL G. WALTER,
New York, N. Y.,
RAYBURN L. FOSTER,
Tulsa, Oklahoma,
ALMOND D. COCHRAN,
Okmulgee, Oklahoma,
Counsel for All Respondents Other Than The Equitable Trust Company and Murray, Aldrich & Roberts.

State of Oklahoma, County of Tulsa—ss.

I, Carroll G. Walter, one of the counsel for all respondents other than The Equitable Trust Company and Murray, Aldrich & Roberts, do solemnly swear that the facts recited in the foregoing "Suggestion of Diminution of Record and Motion for *Certiorari* to Correct Same" are true of my own knowledge, except the facts with respect to the indorsements upon the original petition for rehearing and the docket entries of the Circuit Court of Appeals, and those facts I believe to be true. The source of my information and the ground of my belief as to those facts is a report made to me by one of the attorneys employed in my office in New York whom I instructed to examine the records of the Circuit Court of Appeals. Said report states the facts as set forth in the foregoing motion, and the reason why the

affidavit of that attorney is not submitted, is, that to await either its arrival from New York or my return to New York would cause such delay as to unduly shorten the notice of this motion.

CARROLL G. WALTER.

Subscribed and sworn to before me this 3rd day of January, 1930.

JULIA JONES,
Notary Public.

My commission expires August 29, 1931.

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Supreme Court, U.
FILED
JAN 8 1930
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1929

No. 21

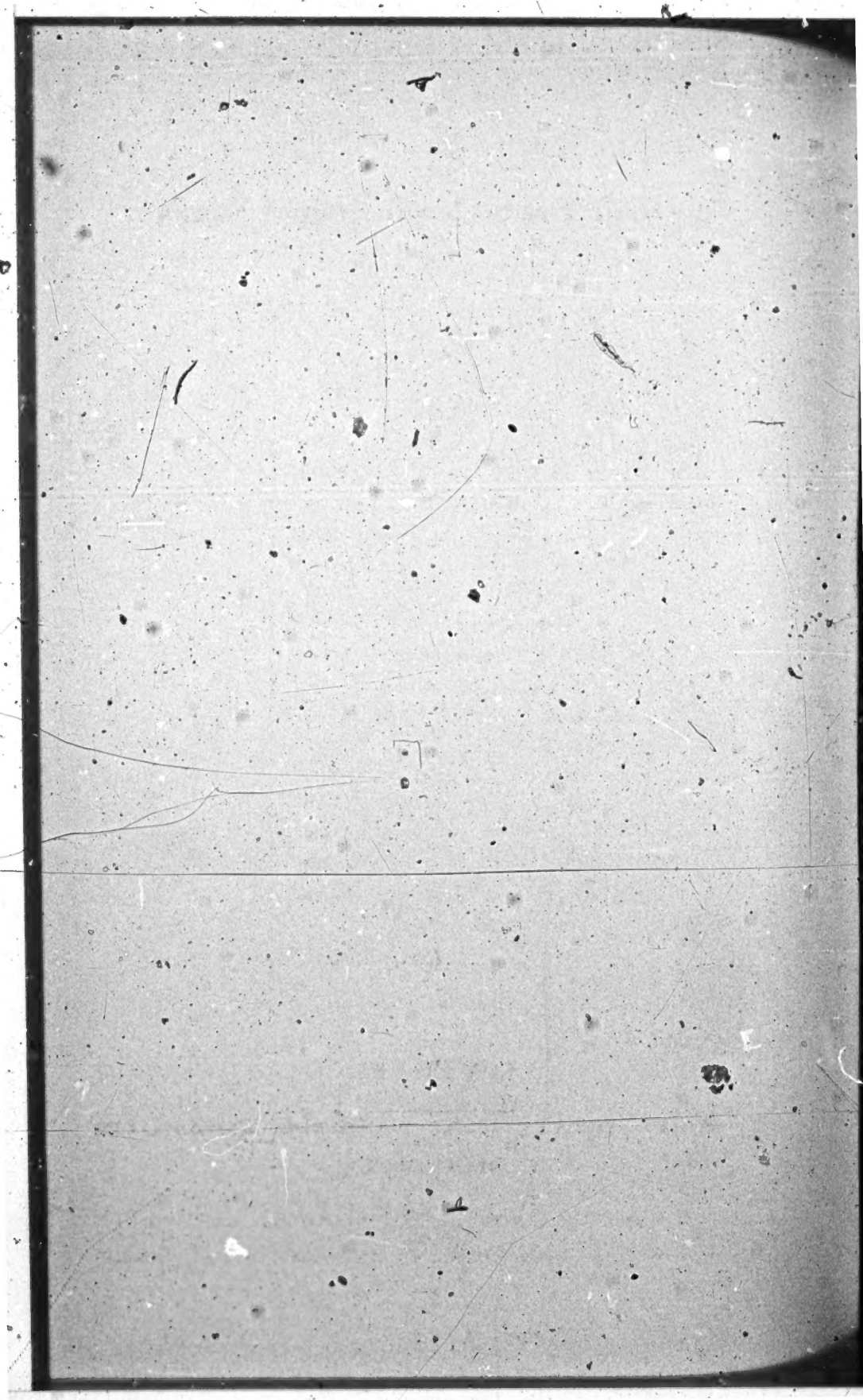
UNITED STATES OF AMERICA,
Petitioner,

v.

THE EQUITABLE TRUST COMPANY OF NEW YORK, and others,
Respondents.

APPENDIX
To Motion for Certiorari to Correct Diminution of Record

CARROLL G. WALTER, New York, N. Y.
RAYBURN L. FOSTER, Tulsa, Okla.
ALMOND D. COCHRAN, Okmulgee, Okla.
Counsel for all Respondents other than Equitable Trust Co. and Murray, Aldrich & Roberts.



Supreme Court of the United States

OCTOBER TERM—1929.

UNITED STATES OF AMERICA,
Petitioner,

vs.

THE EQUITABLE TRUST COMPANY OF NEW YORK; MURRAY, ALDRICH & ROBERTS; EDWARD J. PATTERSON; J. FREDERICK EAGLE; WILLIAM GREENOUGH; SHERMAN DAY; CARROLL G. WALTER and DODGE L. MARKS, composing the firm of PATTERSON, EAGLE, GREENOUGH & DAY; RAYBURN L. FOSTER and R. B. F. HUMMER, composing the firm of HUMMER & FOSTER; ALMOND D. COCHRAN, surviving partner of the firm of COCHRAN & ELLISON; C. B. MCCRORY and DUDLEY C. MONK, co-partners composing the firm of MCCRORY & MONK; and ELMER S. BAILEY, individually and as *prochein ami* of JACKSON BARNETT,
Respondents.

No. 530.

APPENDIX

To Motion for Certiorari to Correct Diminution of Record.

Now COME the undersigned respondents and respectfully present, as an appendix to the suggestion of diminu-

tion of record and motion for certiorari to correct same which they have heretofore filed herein, the attached certified transcript of the proceedings in the Circuit Court of Appeals in this case which are omitted from the record filed by petitioner herein.

Respectfully submitted,

CARROLL G. WALTER,
New York, N. Y.

RAYBURN L. FOSTER,
Tulsa, Oklahoma.

ALMOND D. COCHRAN,
Okmulgee, Oklahoma.

Counsel for all Respondents other than The Equitable Trust Company and Murray, Aldrich & Roberts.

UNITED STATES CIRCUIT COURT OF APPEALS

For the Second Circuit.

Jackson Barnett, a mental incompetent, by Elmer S. Bailey, his *prochein ami*,

Plaintiff,

against

The Equitable Trust Company of New York and The American Baptist Home Mission Society,

Defendants,

United States of America,

Intervenor,

The Equitable Trust Company of New York, Murray, Aldrich & Roberts; Edward J. Patterson, J. Frederick Eagle, Wm. Greenough, Sherman Day, Carroll G. Walter, and Dodge L. Marks, composing the firm of Patterson, Eagle, Greenough & Day; Rayburn L. Foster and R. B. F. Hummer, composing the firm of Hummer & Foster; Almond D. Cochran, surviving partner of the firm of Cochran & Ellison; C. B. McCrory and Dudley C. Monk, co-partners composing the firm of McCrory & Monk; and Elmer S. Bailey, individually and as *prochein ami* of Jackson Barnett,

Appellees,

against

United States of America,

Appellant.

I, William Parkin, Clerk of the United States Court of Appeals, Second Circuit, do hereby certify that the follow-

ing is a full and true copy of the decision of this Court endorsed on the original petition for a rehearing of the above entitled case, on file in this office, and of the filing stamp affixed at the time of filing said decision:

Petition denied.

T. W. S.
A. N. H.

September 7, 1929.

UNITED STATES CIRCUIT COURT OF APPEALS
Filed September 11, 1929
WILLIAM PARKIN, *Clerk*,
Second Circuit.

Dated January 4, 1930.

WM. PARKIN,
Clerk.

(SEAL OF U. S. CIRCUIT COURT OF APPEALS)

UNITED STATES CIRCUIT COURT OF APPEALS,

Second Circuit.

I, WILLIAM PARKIN, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify the following to be true copies of the docket entries in the case entitled

JACKSON BARNETT, by ELMER S. BAILEY, his *prochein ami*, *Plaintiff*,

vs.

EQUITABLE TRUST COMPANY OF NEW YORK, *et al.*, *Defendants*,

UNITED STATES, *Appellant*,

as the same remain of record and on file in my office.

March	8, 1929	Filed Record
	8	Filed 24 copies record
	9	Filed order as to record
	13	Filed motion to dismiss
April	15	Filed brief appellee
	30	Filed motion to dismiss
May	6	Motion denied
	6	Filed motion papers
	13	Filed brief appellant
	13	Filed order denying motion
	20	Filed brief appellee, reply
July	15	Decree modified, L. HAND, *C. J.*
	22	Filed order for mandate
	22	Filed order extending time
Aug.	12	Filed petition for rehearing

Sept.	11	Petition denied (Endsd.)
	11	Issued mandate
	19	Filed order denying petition
Nov.	29	Certified record to Solr. General.

Dated, New York, January 6, 1930.

WM. PARKIN.
Clerk.

(SEAL OF U. S. CIRCUIT COURT OF APPEALS)

UNITED STATES CIRCUIT COURT OF APPEALS

For the Second Circuit.

JACKSON BARNETT, a mental incompetent, by ELMER S. BAILEY, his *prochein ami*,

Plaintiff,

against

THE EQUITABLE TRUST COMPANY OF NEW YORK and THE AMERICAN BAPTIST HOME MISSION SOCIETY,

Defendants,

UNITED STATES OF AMERICA,

Intervenor,

THE EQUITABLE TRUST COMPANY OF NEW YORK, MURRAY, ALDRICH & ROBERTS; EDWARD J. PATTERSON, J. FREDERICK EAGLE, WM. GREENOUGH, SHERMAN DAY, CARROLL G. WALTER, and DODGE L. MARKS, composing the firm of PATTERSON, EAGLE, GREENOUGH & DAY; RAYBURN L. FOSTER and R. B. F. HUMMER, composing the firm of HUMMER & FOSTER; ALMOND D. COCHRAN, surviving partner of the firm of COCHRAN & ELLISON; C. B. MCCRORY and DUDLEY C. MONK, co-partners composing the firm of MCCRORY & MONK; and ELMER S. BAILEY, individually and as *prochein ami* of Jackson Barnett,

Appellees,

against

UNITED STATES OF AMERICA,

Appellant.

The above entitled cause coming on further to be heard, and it appearing that the opinion of this Court was filed in

the Clerk's Office on Monday, July 15, 1929, now, on motion of PATTERSON, EAGLE, GREENOUGH & DAY, it is

ORDERED that the time of the firm of PATTERSON, EAGLE, GREENOUGH & DAY, the firm of HUMMER & FOSTER, ALMOND D. COCHRAN, and the firm of MCCRORY & MONK to file a petition for rehearing herein be and it hereby is extended to and including the 15th day of August, 1929; and it is

FURTHER ORDERED that pending the filing of a petition for rehearing within the time herein limited no mandate shall issue.

Dated, July 22, 1929.

THOMAS W. SWAN,
U. S. Circuit Judge.

A true copy,
WM. PARKIN,
Clerk.

(SEAL OF U. S. CIRCUIT COURT OF APPEALS)